ORIGINAL

RECEIVED
SEP 28 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

Case No. 81-5329

DAVID LIVINGSTON FUNCHESS,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
ASSISTANT ATTORNEY GENERAL

THE CAPITOL, SUITE 1502
TALLAHASSEE, FL 32301
(904) 488-0290

COUNSEL FOR RESPONDENT

TOPICAL INDEX

PRELIMINARY STATEMENT 1

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE AND OF THE FACTS 3

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW 3

REASONS FOR NOT GRANTING THE WRIT 6

CONCLUSION 16

CERTIFICATE OF SERVICE 17

TABLE OF CITATIONS

Cases	Page(s)
Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969)	6, 11, 13
Combs v. State, ___ So.2d ___ (Fla. Supreme Court Case No. 59,425, opinion filed 7.30181)	7, 8
Dougan v. State, 398 So.2d 439 (Fla. 1981)	12
Funchess v. State, 341 So.2d 762 (Fla. 1976)	3
Funchess v. State, 367 So.2d 1007 (Fla. 1979)	3
Funchess v. State, 399 So.2d 356 (Fla. 1981)	3, 4-5
Gardner v. State, 430 U.S. 349 (1977)	10, 11, 12, 15, 16
Hargrave v. State, 366 So.2d 1 (Fla. 1978)	7, 8
Godfrey v. Georgia, 446 U.S. 420 (1980)	9
Proffitt v. State, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) reh.den. 429 U.S. 875, 97 S.Ct. 198, 50 L.Ed.2d 158	11
Salvatore v. State, 366 So.2d 745 (Fla. 1978)	7, 8
Ross v. State, 386 So.2d 1191 (Fla. 1980)	7, 8
Songer v. State, 365 So.2d 696 (Fla. 1978) cert.denied 441 U.S. 956	10, 14-15
State v. Dixon, 283 So.2d 1 (Fla. 1973)	8
Washington v. State, 362 So.2d 658 (Fla. 1978)	7, 8

STATUTES	
Florida Statutes, Section 921.141(5)	3
Florida Statutes, Section 921.141(6)(a)	6, 7

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 81-

DAVID LIVINGSTON FUNCHESS,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

PRELIMINARY STATEMENT

Respondent accepts the portion of the Petition for Writ of Certiorari setting forth the Questions Presented, the Citations to Opinions Below, Jurisdiction, and Constitutional and Statutory Provisions Involved found on Pages i and 1 of the Petition. In accepting the Questions Presented, Respondent does not accept any assumptions of law contained in the points as set forth.

QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER STANDARDLESS APPLICATION OF A MITIGATING CIRCUMSTANCE THAT "THE DEFENDANT HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY" THAT BY STATUTE IS ONE OF THE SEVERAL FACTORS TO BE DETERMINATIVE OF THE SENTENCE CONSTITUTES A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHEN A SENTENCE OF DEATH IS IMPOSED,

-and-

WHETHER ARBITRARY APPLICATION FROM CASE-TO-CASE OF THE SAME MITIGATING FACTOR, RESULTING IN PREJUDICIAL APPLICATION TO THE PETITIONER, VIOLATES THE EIGHTH AMENDMENT'S BAN ON CRUEL AND UNUSUAL PUNISHMENT.

II. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER IT IS CONSTITUTIONALLY PERMISSIBLE FOR THE STATE TO PLACE THE BURDEN ON THE DEFENDANT TO PROVE BEYOND A REASONABLE DOUBT THAT HIS IS NOT A DEATH PUNISHABLE CRIME.

III. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE SUPREME COURT OF FLORIDA HAS FASHIONED ADEQUATE RELIEF FOR VIOLATIONS OF GARDNER V. FLORIDA, AND WHETHER THE SUPREME COURT OF FLORIDA HAS ENGAGED IN RUBBER STAMP REVIEW OF DEATH SENTENCES REIMPOSED BY TRIAL JUDGES.

STATEMENT OF THE CASE AND OF THE FACTS

Respondent accepts Petitioner's Statement of the Case to the extent that it is not argumentative and is supported by appropriate references to the record or that portion of the record that has been attached. Respondent would invite this Court's attention to the three decisions in the instant cause, Funchess v. State, 341 So.2d 762 (Fla. 1976); Funchess v. State, 367 So.2d 1007 (Fla. 1979); and Funchess v. State, 399 So.2d 356 (Fla. 1981) for an accurate recital of the facts presented at the trial court below and a history of the course said case has taken through the Florida appellate courts.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

On appeal from the re-imposition of two death sentences December 6, 1979, Petitioner argued eight points of appeal. Contained there, Petitioner asserted that the trial court erred in imposing the sentence of death because the aggravating circumstances were not shown to have outweighed the mitigating circumstances; that the aggravating circumstance found in Subsection (h) under § 921.141(5), Fla.Stat., had to be set aside or a new jury recommendation obtained because said jury was inadequately instructed on the law pertaining to the aggravating circumstances because no definition was given; that fundamental error occurred in that the penalty instruction given the jury stated that the aggravating and mitigating circumstances must be proven beyond a reasonable doubt; that fundamental error occurred because the jury was instructed that death

is presumed to be "the proper sentence" on a finding of any aggravating factor; that the jury was erroneously instructed regarding its consideration of certain factors in assessing certain aggravating circumstances; that the jury was given misleading instructions to the extent that it could only consider statutory mitigating circumstances; that the finding that the Petitioner committed the murders during the commission of a robbery resulted in an automatic aggravation of the offense for a felony which could have formed the basis for the conviction violated the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution; and that in the interest of justice, a second advisory jury should have been impaneled for Petitioner's resentencing.

The Florida Supreme Court in resolving the issues raised by Petitioner in Funchess v. State, 399 So.2d 356 (Fla. 1981), concluded that as to whether there was sufficient evidence of aggravation to outweigh any mitigating factors in Petitioner's cause that:

> The only proper question now presented is whether there is substantial competent evidence to support the express findings of the trial judge that sentences of death are appropriate for Funchess. We are satisfied from our review of the evidence presented at the resentencing procedure, and from the record of the original sentencing proceeding; first, that the trial judge properly performed his weighing function with respect to one new mitigating circumstance developed at the resentencing proceeding and the aggravating factors which had been established at the original proceeding (all but one of which were unchallenged on remand); and second, that there was substantial and competent evidence to support the findings of the trial judge with respect to the aggravating and mitigating circumstances articulated in his resentencing order.
>
> The dictates of Gardner v. Florida

> have been faithfully met by the trial court in this case, and sentences of death were properly imposed . . .

[399 So.2d at 356-357]

With regard to Petitioner's contention that "the jury was improperly instructed concerning the burden of proof of aggravating and mitigating circumstances in violation of the Fourteenth Amendment to the United States Constitution" [Petitioner's Petition, p.2], the court held:

> Funchess makes a number of legal attacks on the propriety of instructions given to the jury at the sentencing proceeding of his first trial, arguing that the order remanding for so-called "Gardner relief" should have included a mandate for reconvening an advisory jury. We reject all of these contentions. The purpose for our remand was to comply with dictates of the United States Supreme Court in Gardner v. Florida; was not to provide an entirely new sentencing proceeding at which a new advisory jury could be reconvened. Songer v. State, 365 So.2d 696 (Fla. 1978), cert.denied 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979). Complying with our mandate, the trial court properly rejected all legal points raised by Funchess' counsel.

[399 So.2d at 356]

Respondent would therefore submit that as to Petitioner's second contention regarding the propriety of the jury instructions given during Petitioner's original jury sentencing consideration, the question was not properly before the Florida Supreme Court, and therefore, the merits of said claim were not reviewed by said Court.

Finally, as to whether the Florida Supreme Court is only providing a cursory review of Petitioner's re-imposed death sentences, Respondent would tender that this issue has never specifically been brought to the attention of the Florida Supreme Court. While Petitioner argued that in the interest of justice he was entitled to a new advisory sentencing

panel, and that the aggravating circumstances did not outweigh the mitigating circumstances, the question of whether the Florida Supreme Court had engaged in a rubber-stamp review of death sentences has not been litigated. See Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969).

REASONS FOR NOT GRANTING THE WRIT

I.

WHETHER THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER STANDARDLESS APPLICATION OF A MITIGATING CIRCUMSTANCE THAT "THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY" THAT BY STATUTE IS ONE OF THE SEVERAL FACTORS TO BE DETERMINATIVE OF THE SENTENCE CONSTITUTES A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHEN A SENTENCE OF DEATH IS IMPOSED,

-and-

WHETHER ARBITRARY APPLICATION FROM CASE-TO-CASE OF THE SAME MITIGATING FACTOR, RESULTING IN PREJUDICIAL APPLICATION TO THE PETITIONER, VIOLATES THE EIGHTH AMENDMENT'S BAN ON CRUEL AND UNUSUAL PUNISHMENT.

Petitioner first asserts that the trial court erred in not concluding that Petitioner had no "significant history of prior criminal activity" as found in § 921.141(6)(a), Fla.Stat. (1975) a statutory mitigating consideration. A review of Petitioner's Appendix G-29 and G-30, refutes said claim.

The trial court in the instant cause after resentencing proceeding, concluded in his sentencing order issued December 6, 1979, [G-27 through G-35] that Petitioner indeed had a

significant history of prior criminal activity which negated any mitigating circumstance in this regard. The Florida Supreme Court in reviewing same agreed.

In the face of said finding, Petitioner asserts not that said findings were erroneous, but rather, that "the mitigating factor of lack of a significant history of prior criminal activity has been applied in a standardless manner by the courts of the State of Florida resulting in substantial prejudice to this Petitioner." [Petitioner's Petition, p.3]. Citing to a number of capital cases, to-wit: Salvatore v. State, 366 So.2d 745 (Fla. 1978); Hargrave v. State, 366 So.2d 1 (Fla. 1978); Ross v. State, 386 So.2d 1191 (Fla. 1980); and Combs v. State, ___ So.2d ___ (Fla., Supreme Court Case No. 59,425, opinion filed July 30, 1981), Petitioner asserts that he was "denied any mitigating consideration of the same mitigating factor by the sentencing court although Petitioner had not previously been convicted of a felony, nor ever been sentenced to prison (Appendix G 3-4)." [Petitioner's Petition, p.4].

Respondent would submit that the Florida Supreme Court's decision in Washington v. State, 362 So.2d 658 (Fla. 1978) addressed the very issue of which Petitioner complains by acknowledging that, while it was necessary to demonstrate that a defendant had been convicted of crimes to serve as an aggravating circumstance, criminal activity was sufficient to negate the mitigating circumstance found in § 921.141(6)(a), Fla.Stat. The court held:

> We come now to Washington's assault upon the trial judge's sentence, alleging his failure to consider the presence of two mitigating circumstances specified by § 921.141(6), Fla.Stat. (1975), plus an additional circumstance which he maintains should have been considered in mitigation. He first assails the judge's failure to find the lack

> of a significant history of prior criminal activity. § 921.141(6)(a), Fla.Stat. (1975). However, it appears from the record, and was recognized by the trial judge, that Appellant had carried on a course of burglaries, had stolen property, for a significant period of time. In his confession in the Birk case, Appellant stated he had committed a series of burglaries around Dade County and had sold the stolen merchandise to Katrina Birk and her husband. He reiterated in open court that he was selling "hot merchandise" to Katrina Birk. Appellant asserts that under the rule announced in Provence, supra, previous convictions are required to negative § 921.141(6)(a). Washington misconstrues the holding in Provence. That case construed § 921.141(5)(b) which requires previous conviction of another capital felony involving the use or threat of violence. We held: clearly, the language of that subsection excludes the possibility of considering mere arrest or accusations as factors in aggravation." (emphasis supplied). 337 So.2d 786. Section 921.141(6)(a) makes no reference to conviction and, hence, Provence has no application to the instant case.
>
> [362 So.2d at 666-667]

True to the guidelines as set forth in State v. Dixon, 283 So.2d 1 (Fla. 1973), Respondent would submit the trial court sub judice reviewed Petitioner's prior criminal activity and concluded that it was significant, and therefore, Petitioner was not entitled to the application of said mitigating circumstance in his case. Unlike Salvatore v. State, supra, Petitioner had been involved in more than just one burglary; unlike Hargrave v. State, supra, Petitioner's prior criminal activity consisted of both convictions and non-conviction; unlike Ross v. State, supra, Petitioner's admitted crimes were more than just "petty offenses"; and unlike Combs v. State, supra, Petitioner's prior criminal

activity developed from insignificant, petty offenses to admitted criminal activities of robbery, drug abuse, and theft.

While Respondent agrees that "the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and caprecious manner." Godfrey v. Georgia, 446 U.S. 420, 427 (1980), the application by the trial court and review by the Florida Supreme Court of the applicability of this statutory mitigating circumstance in Petitioner's case does not violate the spirit of Godfrey v. Georgia, supra.

Simply because Petitioner says its so is not borne out by the trial court's finding and the Florida Supreme Court's review of Petitioner's case. Petitioner has failed to come forth and demonstrate that trial court and the Florida Supreme Court in reviewing death penalty proceedings have applied a standardless review of this particular mitigating circumstance. As observed by the Florida Supreme Court in the instant cause:

> . . . We are satisfied from our review of the evidence presented at the resentencing procedure and from the record or the original sentencing proceeding: first, that the trial judge properly performed his weighing function with respect to the one new mitigating circumstance developed at the resentencing proceeding, and the aggravating factors which had been established at the original proceeding (all but one of which were unchallenged on remand) and second, that there was substantial and competent evidence to support the findings of the trial judge with respect to the aggravating and mitigating circumstances articulated in his resentencing order.

[399 So.2d at 357]

II.

WHETHER THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER IT IS CONSTITUTIONALLY PERMISSIBLE FOR THE STATE TO PLACE THE BURDEN ON THE DEFENDANT TO PROVE BEYOND A REASONABLE DOUBT THAT HIS IS NOT A DEATH PUNISHABLE CRIME.

Petitioner's second issue for review takes umbrage with the instruction given by the trial judge at the original sentencing proceeding regarding whether the jury must find beyond a reasonable doubt that mitigating circumstances exist. This particular issue was one of six issues presented to the Florida Supreme Court on appeal from the resentencing proceedings which was not a proper issue for review. See Songer v. State, 365 So.2d 696 (Fla. 1978) cert.denied 441 U.S. 956.

The Florida Supreme Court in remanding the cause to the trial court for review pursuant to Gardner v. Florida, 430 U.S. 349 (1977) limited the trial urt's review to allowing Petitioner to come forth and refute, modify, and present testimony regarding the pre-sentence investigation report utilized by the trial court at sentencing. Petitioner on appeal from said proceeding, attempted to argue matters which were not properly before the court regarding jury instructions which were given at the original sentencing proceeding. The Florida Supreme Court in rejecting the review of said claims, concluded:

> Funchess makes a number of legal attacks on the propriety of instructions given to the jury at the sentencing proceeding of his first trial, arguing that the order remanding for so-called "Gardner relief" should have included a mandate for reconvening an advisory jury. We reject all of these contentions. The purpose for our remand was to comply with the dictates of the United States Supreme Court in Gardner v. Florida; it was not to provide an entirely new sentencing proceeding at which a new advisory jury could be reconvened. Songer v. State,

365 So.2d 696 (Fla. 1978) cert. denied 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979). Complying with our mandate, the trial court properly rejected all legal points raised by Funchess' counsel.

[399 So.2d at 356]

In the instant cause, the propriety of jury instructions was not an issue for review and thus, no record was developed regarding the merits of said claim. Moreover, said issue is not a proper issue for certiorari review by this Court in that pursuant to Cardinale v. Louisiana, supra, the question of whether said instruction was appropriate or constitutionally infirm has not been addressed by a State trial tribunal or an appellate court. Therefore, until such time as Petitioner has appropriately brought the issue before a state court, this Court should decline review of Petitioner's complaint.

III.

WHETHER THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE SUPREME COURT OF FLORIDA HAS FASHIONED ADEQUATE RELIEF FOR VIOLATIONS OF GARDNER V. FLORIDA, AND WHETHER THE SUPREME COURT OF FLORIDA HAS ENGAGED IN RUBBER STAMP REVIEW OF DEATH SENTENCES REIMPOSED BY TRIAL JUDGES.

Petitioner's last complaint urges that the Florida Supreme Court in formulating its procedure for review of possible Gardner v. Florida, supra, problems, has provided an inadequate proceeding "because neither the resentencing hearing nor the review of the newly imposed death sentence meets the standards articulated in Proffitt v. Florida, supra, because neither the sentencing proceeding

itself nor the review by the Florida Supreme Court are adequate to afford the defendant an adequate opportunity to be heard as to why he should not receive the death penalty." [Petitioner's Petition, p. 12]. Citing to Justice McDonald's dissenting opinion in Dougan v. State, 398 So.2d 439, 441 (Fla. 1981), Petitioner quotes: "Just because it is the same as a prior affirmed sentence does not necessarily make this one correct; it must pass constitutional muster on its own." [Petitioner's Petition, p. 12].

Petitioner argued to the Florida Supreme Court that in the interest of justice, another jury advisory sentencing proceeding was necessary. Specifically, he argued:

> The extensive mitigation shown by the evidence at the Gardner proceeding makes it imperative for another jury's advisory recommendation to be received by the trial court so that it may also be considered in determination of a proper sentence for these capital crimes.

The sole purpose for vacating the Petitioner's original sentence and remanding the case to the trial court for a second resentencing was predicated on Petitioner's complaint that a Gardner violation occurred, not that a multitude of errors occurred at the original sentencing proceeding. Indeed, a review of the trial record before the Florida Supreme Court in the instant cause reflects that Petitioner's trial counsel at the resentencing proceeding appreciated that the purpose for said proceeding was to allow Petitioner to refute, modify, or counter information contained in the pre-sentence investigation report used by the trial judge at sentencing.

The Florida Supreme Court in reviewing whether in the interest of justice, a new advisory sentencing proceeding should have been had pursuant to this Gardner

resentencing, again re-confirmed the purpose of said proceeding by concluding that the only issue for review was whether Petitioner had a full and fair opportunity to refute the pre-sentence investigation report used and to present testimony to do same. Therefore, the question raised by Petitioner in his third issue for review has never been an issue before either the state trial court or an appellate court for consideration. See Cardinale v. Louisiana, supra.

The Florida Supreme Court in an attempt to correct any possible Gardner v. Florida, supra, infirmities, in a number of cases including Petitioner's, vacated the death sentence and remanded the cause to the trial court for a new sentencing proceeding without an advisory jury being impaneled to allow Petitioner an opportunity to present evidence to the trial court which would refute information contained in the P.S.I. report. In Petitioner's case, the evidence presented to refute same and the decisional law which issued from the time of the original sentencing to the time of his second sentencing proceeding, resulted in modifications of the aggravating circumstances and mitigating circumstances found by the original trial court. The findings of fact by the trial court reflect same.

The Florida Supreme Court in reviewing the effect of the Gardner proceeding in Petitioner's case, reviewed the original trial sentencing proceeding and the new sentencing proceeding and concluded that the reimposition of the death penalty in the instant cause was based on the fact that the aggravating circumstances outweighed the mitigating circumstances that existed at the time of the second sentencing proceeding in 1979.

In Songer v. State, supra, the Florida Supreme Court addressed a similar issue as raised herein.

> On this appeal from resentencing, two points are raised. First, Appellant contends that the trial court erred in refusing to impanel a jury an conduct a new sentencing trial in accordance with § 921.141 Fla.Stat. (1975). It is the Appellant's review that when the United States Supreme Court vacated the Appellant's original sentence of death, the sentence was thereby rendered void. Appellant submits that any subsequent sentence, to be lawfully imposed must be preceded by another advisory sentencing before a jury under § 921.141, Fla.Stat. (1975). The State responds that both the United States Supreme Court and this Court intended that the case be remanded to the trial court for the very limited purpose of "consideration in light of Gardner v. Florida," Songer v. Florida, 430 U.S. 952, 97 S.Ct. 1594, 51 L.Ed.2d 801 (1977). The state further asserts that the only question presented is whether the trial court complied with due porcess requirements of the Gardner decision which directs that when a court imposes a sentence of death, a defendant must have an opportunity to explain or rebut any information before the court on which the sentence is to be based.
>
> * * *
>
> We hold that the trial court did not err in refusing to impanel a jury upon resentencing or to hear witnesses in mitigation of the sentence and that the trial court properly complied with Rule 3.720(b) Fla.R.Crim.P. This Court's order of May 17, 1977, remanded the case to the trial court for resentencing "only consistent with the opinion of the Supreme Court of the United States in Gardner." Under that order, the case was remanded to the trial court to assure that the sentence was not imposed on the basis of any information which the Appellant did not have an opportunity to rebut or explain. The record now reflects there was no initial Gardner violation because trial counsel was given a copy of the

> pre-sentence investigation report prior to the original sentencing. The trial court on remand clarified the record by showing that Appellant's trial counsel had a copy of the presentence investigation at the first sentencing hearing. At the second sentencing hearing, the trial court also afforded Appellant's counsel another opportunity to challenge the accuracy of the same presentence investigation report. The only response was a request for a more expansive report.
>
> [365 So.2d at 696]

In Florida, the advisory jury sitting in a capitol case never sees the pre-sentence investigation in that said report is not made available to an advisory sentencing jury. Indeed, in the Florida sentencing structure, the sentencer, to-wit: the trial judge, is the only one to consider the pre-sentence investigation in making a determination as to whether the jury's recommendation should be followed or dismissed. Therefore, a second advisory sentencing jury is not needed when, as in the instant case, a Gardner violation occurs, and a given defendant is given an opportunity to refute said report. See Songer v. State, supra.

Petitioner is attempting to do indirectly what he cannot do directly, to-wit: resurrect further mitigation which could or should have been presented to the sentencing jury at the time of his original sentencing proceeding. Couched in the language that, "the trial court reimposed death sentences but upon drastically different findings of fact," [Petitioner's Petition, p. 10], Petitioner attempts to seek a completely new expanded sentencing hearing based on his initial limited complaint that a judicial error, to-wit: a Gardner violation, occurred.

Petitioner has failed to make out a claim that he is entitled to this Court's review in question three of his Petition.

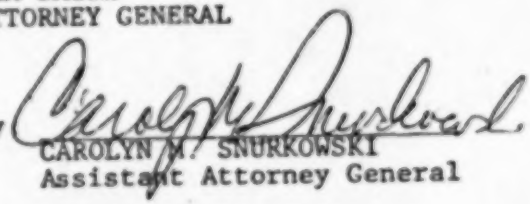
Further, Respondent would urge that the Florida Supreme Court's opinion speaks for itself with regard to the question of whether the Florida Supreme Court rubber stamps the reimposition of death sentences in Florida.

CONCLUSION

Petitioner raised three questions which urge review by this Court. Respondent would submit each fails to demonstrate review is necessary. Even couched in magical terms, Petitioner has failed to demonstrate that the Florida Supreme Court's procedures in addressing Gardner v. Florida infirmities suffers any constitutional deficiency. Therefore, Respondent would urge this Court to deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL

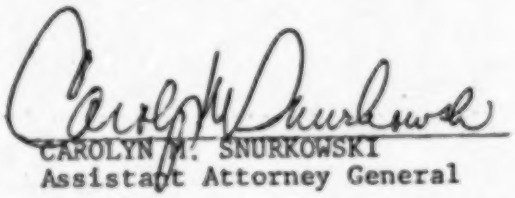
By 
CAROLYN M. SNURKOWSKI
Assistant Attorney General

THE CAPITOL, Suite 1502
Tallahassee, FL 32301
(904) 488-0290

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished P. DOUGLAS BRINKMEYER, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302 via hand delivery on this 24th day of September, 1981.



CAROLYN M. SNURKOWSKI
Assistant Attorney General

-of counsel-